IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1340

HAROLD SMITH,

Appellant,

vs.

ROSITA GUMMO, JAMES GUMMO AND ROBERT DANIEL GUMMO,

Appellees.

On Appeal from the Court of Appeal of the State of California in and for the First Appellate District

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

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No. .....

HAROLD SMITH, *Appellant,*

vs.

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JURISDICTIONAL STATEMENT

I.

INTRODUCTION.

Appellant appeals from the judgment of the Court of Appeal of the State of California in and for the First Appellant District, entered on October 5, 1977, affirm-

ing the dismissal of Appellant's action by the Superior Court of the State of California in and for the County of Santa Clara, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

II.

OPINION BELOW.

The Opinion of the Court of Appeal of the State of California in and for the First Appellate District is not reported. A copy of the Opinion is attached hereto as Appendix A.

III.

JURISDICTION.

This is an action by the Appellant to establish his paternity of Robert Daniel Gummo. It was filed in the Superior Court of the State of California in and for the County of Santa Clara in May, 1976. The action was dismissed. Appellant appealed to the Court of Appeal of the State of California in and for the First Appellate District. The judgment of the Court of Appeal of the State of California in and for the First Appellate District was entered on October 5, 1977, affirming the decision of the Superior Court. Thereafter, Appellant petitioned the Court of Appeal for a rehearing. Said Petition for Rehearing was denied on November 4, 1977. (Appendix B, page 1.) Thereafter, Appellant petitioned the Supreme Court of the State of California for a hearing to review the decision rendered by the Court of Appeal. Said Petition for Hearing was denied on December 1, 1977. (Appendix B, page 2.) A Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeal of the State of California in and for the First Appellate District on February 22, 1978. (Appendix B, pages 3 and 4.) The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257 (2).

While this appeal is being docketed more than 90 days beyond the entry of the judgment being appealed from, Appellant requested, within the 90 day period, an extension of time within which to docket this appeal. Appellant's request was denied. However, it should be noted that the Notice of Appeal was *timely filed*. There is no jurisdictional defect.[1]

A copy of the Decision of the Court of Appeal is attached hereto as Appendix A.[2]

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[1] The Application for Extension of Time to Docket Appeal was mailed to the Supreme Court of the United States on February 17, 1978, thirteen (13) days before the day set for docketing, however, due to post office inefficiency, the application did not arrive at the Office of the Clerk of the Supreme Court of the United States until February 27, 1978. A copy of my declaration outlining the events is attached as Appendix E.

[2] Copies of the Order Denying a Rehearing in the Court of Appeal, (Appendix B, page 1), the Order Denying a Hearing in the Supreme Court of the State of California, (Appendix B, page 2) and the Notice of Appeal to the Supreme Court of the United States (Appendix B, pages 3 and 4), are attached hereto as Appendix B.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

A. United States Constitution, Amendment XIV, Section 1:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

B. California Evidence Code, Section 621:

"Notwithstanding any other provision of the law, the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

V.

QUESTION PRESENTED.

Whether the irrebuttable presumption of California Evidence Code, Section 621, deprives Appellant of the due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States by denying him the opportunity to present any evidence to establish his paternity of Robert Daniel Gummo, thereby depriving him of access to the courts and the judicial process.

VI.

STATEMENT.

A. Facts and Procedure:

In May, 1976, Appellant, Harold Smith, brought an action to establish his paternity of the defendant, Robert Daniel Gummo, [hereinafter referred to as "Robert"], in the Superior Court of the State of California in and for the County of Santa Clara. The other parties to this action were Rosita Gummo, the mother, and James Gummo, Rosita Gummo's husband. Harold Smith alleges that Robert is his son and desires to establish his paternity so that he may assume the legal rights, duties and obligations inherent in being Robert's father.

Robert was conceived some time late in September, or early in October of 1974. At the time Robert was conceived, it is uncontested that Harold Smith and Rosita Gummo were having sexual intercourse on a regular basis. Robert was born on June 28, 1975, at Alexian Brothers Hospital in San Jose, California. At the time of conception and birth, Rosita Gummo and James Gummo were living together.

Blood tests have been performed pursuant to California Evidence Code, Section 892.[3] The results show

[3] California Evidence Code, Section 892: In a civil action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paterniy against such party or enforce its order if the rights of others and the interests of justice so require.

conclusively that James Gummo could not be the father of Robert. However, the results indicate that there is a 90.5% probability that Harold Smith is the father of Robert. In December, 1976, pursuant to a motion brought by Appellees, based on California Evidence Code, Section 621, which provides for a conclusive presumption of legitimacy of any child of a wife conceived while cohabiting with her husband who is not impotent or sterile, Harold Smith's action was dismissed. On December 30, 1976, Appellant filed a Notice of Appeal in the Superior Court of the State of California in and for the County of Santa Clara, appealing to the Court of Appeal of the State of California for the First Appellate District, from the dismissal entered by the Superior Court. The Court of Appeal, relying on the decision in *Kusior v. Silver*, 54 Cal. 2d 603, 7 Cal. Rptr. 129 (1960), found that Section 621 did not violate the Due Process Clause or Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States (Appendix A.). On October 12, 1977, Appellant petitioned the Court of Appeal of the State of California for rehearing. Said Petition was denied on November 4, 1977. (Appendix B, page 1.)

On November 9, 1977, Appellant petitioned the Supreme Court of the State of California for a hearing to review the decision of the Court of Appeal. Appellant's Petition for Hearing was denied on December 1, 1977. (Appendix B, page 2.)

On February 22, 1978, Appellant filed in the Court of Appeal of the State of California in and for the First Appellate District, a Notice of Appeal to the Supreme Court of the United States. (Appendix B, pages 3 and 4.)

B. How the Federal Question is Presented.

The violation of the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States caused by the operation of California Evidence Code, Section 621, was first questioned in Appellant's Points and Authorities in Opposition to Appellees motion to dismiss in the Superior Court. After the Superior Court granted the Appellees motion and dismissed Appellant's action, Appellant again argued the violation of the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States caused by the operation of California Evidence Code, Section 621 in his Opening Brief to the Court of Appeal of the State of California in and for the First Appellate District. The Court of Appeal, in response to Appellant's constitutional argument, stated:

> While we recognize that the conclusive presumption has been critized as an antiquated rule of law and that its constitutionality has been questioned (See *California Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*) (1962) 35 So. Cal. L.Rev. 437, 467-474), we are bound by the language of *Kusior v. Silver* (1960) 54 Cal.2d 603.

Appellant, in his petition for hearing filed in the Supreme Court of the State of California, argued that the decision of the Court of Appeal of the State of California conflicted with the decisions of the Supreme Court of the United States and the Supreme Court of the State California in that it denied Appellant basic and essential rights in violation of the Due Process

Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States.

VII.

THE QUESTIONS ARE SUBSTANTIAL

A. Introduction.

In California, Evidence Code, Section 621 creates an irrebuttable presumption of the legitimacy of a child where it has been shown that at the time of conception the husband and wife were cohabiting and the husband was neither impotent nor sterile. In *Kusior v. Silver*, 54 Cal.2d 603, 7 Cal.Rptr. 129 (1960) the Supreme Court of California held that where the preliminary facts of Section 621 are established, evidence of blood test results were not admissible to rebut the presumption of legitimacy. (See Callister, *Conclusive Presumption of Legitimacy Not Overcome By Negative Results of Blood Tests*, 34 So.Cal.L.R. 104 (1960).)

B. The Issue — Whether Harold Smith Will Be Allowed To Prove He Is Robert's Father.

The narrow issue before this Court is whether Harold Smith can introduce any evidence, and in particular, blood test results, to establish his paternity of Robert and to exclude James Gummo as the father of Robert, where Rosita Gummo and James Gummo were married, cohabitating at the time of conception and James Gummo claims he was not impotent or sterile. The reality of the situation is known from blood test

results—there is a 90.5% probability that Harold Smith is the father of Robert and there is a zero percent probability that James Gummo is Robert's father.

C. Important Federal Questions are Presented.

1. Harold Smith's basic and essential right to conceive and raise his child, is being denied by the irrebuttable presumption of Evidence Code, Section 621.

a. Harold Smith's interest in a primary familial relationship with his son is protected and warrants deference.

The fundamental interest of Harold Smith in the care, custody, support, and nurture of Robert finds deep roots in the long line of Supreme Court cases establishing that the right to conceive and raise children are essential, basic rights of free men more precious than property rights. *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923). Statutes which tread on these basic rights are constitutionally suspect. Such a constitutionally protected fundamental interest of a man in the children he has sired warrants deference. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972).[4]

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[4] See also: Bois, *California's Conclusive Presumption of Legitimacy —Its Legal Effect and Its Questionable Constitutionality*, 35 So. Cal.L.R. 437, 467-474 (1962); Hoffman, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 Stanford L.R. 754 (1968).

The undeniable importance of the familial relationship and the deference and protection provided it by this court was made clear in *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438 (1944), when it stated:

> It is cardinal with us that custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Difficulties in establishing the biological relationship in a paternity action are no reason to deny access to the courts by the use of irrebuttable presumptions, as recognized by this court in *Gomez v. Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 875 (1973).

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley v. Illinois*, 405 U.S. 645, 656-657, 92 S.Ct. 1208, 1215-1216 (1972); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965).

To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses. *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75-76, 88 S.Ct. 1515, 1516 (1968).

b. Where an irrebuttable presumption effects basic, protected and essential rights and interests of the citizenry it violates the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment.

Harold Smith is being deprived of the essential, basic right to establish a familial relationship with Robert and care for and support Robert by the "legal" lines drawn by the operation of the irrebuttable presumption of California Evidence Code, Section 621. Where an irrebuttable presumption, such as Section 621, effects basic, protected and essential rights and interests of the citizenry, this court has found it to violate the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. (See e.g.: *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791 (1974), (mandatory termination for pregnant teachers); *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973), (presumption that student remains non-resident if he lived out of state at time he applied for admission to school); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, (unwed father presumed unfit to raise children on death of mother); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586 (1971), (Suspension of drivers license after accident without regard to fault); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965), (all servicemen presumed to be non-residents of Texas and denied right to vote).)

In *Stanley v. Illinois, supra*, 405 U.S. 645, 92 S.Ct. 1208 (1972), Peter Stanley, the unwed father of three children, upon the death of the mother, was deprived of the custody of his three children without any hearing

on paternal fitness and without proof of neglect, pursuant to an Illinois statute which irrebuttably presumed an unwed father unfit. This Court held the Illinois statutory scheme to be in violation of the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States as a denial of the constitutionally protected, fundamental and essential interests of Peter Stanley in his children. In speaking to the state's interest in the convenience and efficiency of irrebuttable presumptions, this Court stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance .... But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of vulnerable citizenry from overbearing concern for efficiency and efficacy .... (*Id.* at 656, 92 S.Ct. at 1215.)

In *Carrington v. Rash, supra*, 380 U.S. 89, 85 S.Ct. 775 (1965), the Court recognized that "[T]he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character." (*Id.* at 96, 85 S.Ct. at 780.) Proof of the most positive character—blood test results showing a probability of 90.5% that Harold Smith is Robert's father and a probability of zero percent that James Gummo is Robert's father—is in admissible to overcome the conclusive presumption of Section 621. The "legal" line inscribed by Section 621 excludes the biological reality of Robert's paternity and deprives Harold Smith and Robert of the fundamental familial relationship between father and son.

There exists, and Harold Smith seeks to establish in the eyes of the law, the biological relationship between himself and Robert. Harold Smith wants to establish his paternity of Robert, not deny it. Harold Smith wants to assume the obligations and duties of his status as a parent.

When common sense and reason are outraged by a holding that the presumption of legitimacy abides, the presumption must fail. (*In re Findlay*, 253 N.Y. 1, 170 N.E. 471 (1930); opinion by Mr. Justice Cardozo.) Certainly application of a presumption which finds James Gummo to be Robert's father, when the biological reality is clear that he could not be, must outrage one's common sense and reason. But Harold Smith is not asking this court to determine the identity of Robert's father. He is merely requesting that this court find that an irrebuttable presumption, which leads to outrageous and illogical results be found repugnant to the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. Such a finding would leave standing the rebuttable presumption of legitimacy, while permitting Harold Smith to present to the trier of fact that evidence which he alleges establishes his paternity of Robert and will allow him to develop a father-son relationship with his biological issue.

2. Harold Smith is denied access to the courts and the judicial process on the basis of a 1960 California Supreme Court case, which was decided prior to the rulings of this Court finding statutes relying on irrebuttable presumptions to violate the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment.

The irrebuttable presumption of Evidence Code, Section 621, deprives Harold Smith of access to the courts. It deprives him of a hearing at which he can present evidence to show his paternity of Robert and establish his partial rights and assume his parental duties and obligations. It denies him the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by depriving him of access to the courts and the judicial process. This denial of access is based on the 1960 case of *Kusior v. Silver*, *supra*, 54 Cal.2d. 603, 7 Cal.Rptr. 129 (1960), which found that the exclusion of blood test results dictated by the operation of Evidence Code, Section 621, was not a denial of one's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Kusior* was decided eighteen years ago, long before the numerous decisions from this court finding the use of irrebuttable presumptions to be questionable as a violation of due process and equal protection under the Fourteenth Amendment (See e.g.: cases cited in Paragraph VII. C.1.b., *supra*, page 11).

This court has stated that where "... the judicial proceeding becomes the only effective means of resolving the dispute at hand ... (the) ... denial of a defendant's full access to that process raises grave problems for its legitimacy." (*Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S.Ct. 780, 785 (1971).) The protection of the plaintiff's right to access to the judicial process is also protected and a statutory scheme which deprives a plaintiff of access to the judicial process "raises grave problems for its legitimacy." *Id.*

Harold Smith has no other means of resolving the issue of his paternity of Robert other than by means of the judicial process. He cannot establish himself as the father of Robert other than by judicial decree. Section 621 deprives him of access to the judicial system where he can present the evidence necessary to support a judicial decree of paternity.

In *Boddie v. Connecticut*, *supra*, this court recognized that when the states judicial machinery *must* be invoked to determine the rights and duties of the parties, the contestants "must be given a meaningful opportunity to be heard." (*Id.* at 377, 91 S.Ct. at 785.) Failing this, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States is violated.

> In short, 'within the limits of practicability,' (Citation to *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 70 S.Ct. 652, 659 (1950).), a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. (*Boddie v. Connecticut*, *supra*, 410 U.S. 371, 379, 91 S.Ct. 780, 786-878 (1971).)

Harold Smith is being deprived of his right to establish his paternity of Robert, not just without a "meaningful opportunity to be heard," *Id.* at 379, 91 S.Ct., 787, but without any hearing at all. This is a clear and blatent deprivation and denial of Harold Smith's constitutionally protected rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

D. An incredible conflict exists among the many states as to the admission of evidence, the exclusion of which deprives persons of due process of law and equal protection of the law under the Fourteenth Amendment.

There is an incredible and outrageous conflict between the many states and the District of Columbia with respect to the presentation of evidence to establish paternity under the factual situation presented in this case.

In twenty-one (21) states and the District of Columbia, evidence such as that sought to be introduced by Harold Smith has been deemed admissible, despite the facts of cohabitation and lack of impotency or sterility of the husband. The grounds for admissibility being found in case law and statute (Appendix C, pages 1 & 2.). Section 5 of the Uniform Act on Blood Tests to Determine Paternity (1953) provides for the introduction of blood test results on the issue of paternity,

regardless of the factual settings.[5] The Uniform Act is set forth in its entirety in Appendix D.

The Uniform Act has been adopted wholly, including Section 5, by Illinois, Oklahoma, New Hampshire, and Pennsylvania, and partially, excluding Section 5, by California, Oregon, and Utah (Appendix C, page 1.). However, Utah has provided for the introduction of blood tests in a statutory provision very similar to Section 5. (U.C.A., Section 78-25-21 (1953).)

In nine (9) states, including California, such evidence is not admissible where there is cohabitation and lack of impotency and sterility of the husband (Appendix C, page 3.). In the remaining twenty (20) states, the admissibility question has not been met.

There is a glaring conflict in the consistency of the protection afforded Harold Smith by the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution. In at least twenty-one (21) states and the District of Columbia, Harold Smith would have been allowed access to the courts and would have been permitted to introduce the blood test results to establish his paternity of Robert. This denial of access deprives Harold of his protected, fundamental interests in the conception, care, and upbringing of Robert, (See e.g.: cases cited in Paragraph VII.C.1.a., *supra*, page 9.), and these interests warrant deference.

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[5] SECTION 5. *Effect on Presumption of Legitimacy.* The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

The continued existence of this conflict diminishes the force, effect and ability of the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States "to protect the fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy." *Stanley v. Illinois, supra*, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215 (1972). Where the same facts give rise to different results which deprive a citizen of the basic and essential right under the Due Process Clause and Equal Protection provisions of the Fourteenth Amendment to establish a familial relationship, a resolution of the conflict is necessary to the continued integrity of our societal framework.

VIII.

CONCLUSION.

For the reasons stated above, Appellant submits that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

HAROLD SMITH,

Plaintiff and Appellant,

v.

ROSITA GUMMO, JAMES GUMMO, and ROBERT DANIEL GUMMO,

Defendants and Respondents.

1 Civil No. 40863

(Sup.Ct.No. 350965)

Evidence Code section 621 provides: "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Appellant contends that the operation of section 621 denies him due process of law.

While we recognize that the conclusive presumption has been criticized as an antiquated rule of law and that its constitutionality has been questioned (see California's Conclusive Presumption of Legitimacy - Its Legal Effect and Its Questionable Constitutionality (1962)

35 So.Cal.L.Rev. 437, 467-474), we are bound by the language of Kusior v. Silver (1960) 54 Cal.2d 603. "Our duty as an intermediate appellate court extends no further than the application of that law to the case before us." (Keaton v. Keaton (1970) 7 Cal.App.3d 214, 216-217.) The court did not err in excluding the results of the blood tests.

Appellant further contends that the motion for summary judgment should not have been granted because "the impotency or sterility of James is an issue". In light of the conclusive presumption, appellant is not a proper party plaintiff. (Serway v. Galentine (1946) 75 Cal.App.2d 86, see also Gonzales v. Pacific Greyhound Lines (1950) 34 Cal.2d 749, 752; Civ. Code, § 7006, subd..(a)(2).)

Judgment affirmed.

Draper, P.J.

We concur:

Scott, J.

Feinberg, J.

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division THREE

Harold Smith,
Plaintiff and Appellant,
vs
Rosita Gumpo, et al.,
Defendants and Respondents.

No. 40863

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated NOV - 4 1977

SCOTT, J.

P.J.

ORDER DUE
December 2, 1977

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 3, Civil No. 40863

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SMITH

v.

GUMMO ET AL.

SUPREME COURT
FILED
DEC 1 - 1977
G. E. BISHEL, Clerk

Deputy

Appellant's petition for hearing DENIED.

Bird, C.J., and Newman, J., are of the opinion that the petition should be granted.

FILED
DEC - 1 1977
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
BY: Deputy

BIRD

Chief Justice

COPY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION THREE

HAROLD SMITH, Plaintiff and Appellant, vs. ROSITA GUMMO, JAMES GUMMO, and ROBERT DANIEL GUMMO, Defendants and Respondents.	NO. 1/Civil 40863 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that HAROLD SMITH, the Appellant above-named, hereby appeals to the Supreme Court of the United States for the final judgment of the Court of Appeal of the State of California, affirming that dismissal of the complaint, entered in this action on November 4, 1977, a Petition for Hearing before the Supreme Court of the State of California, having been denied on December 1, 1977.

This appeal is taken pursuant to Title 28, United States

/ / /

/ / /

Code, Section 1257(2).

DATED: February 17, 1978.

MITCHELL & SMITH
A Professional Corporation

By _____
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RELEVANT STATUTES AND DECISIONS OF OTHER JURISDICTIONS.

Those states which by judical decision and/or statute have admitted testimony and/or blood test results into evidence, despite the cohabitation of the husband and wife at the time of conception and the lack of impotency or sterility of the husband are as follows:

Alabama:	*Donahey v. Donahey*, 296 So.2d 188 (1974).
District of Columbia:	*Beach v. Beach*, 72 App.D.C. 318, 114 F.2d 479 (1940).
Georgia:	*Thorton v. State*, 200 S.E.2d 298, 129 Ga.App. 574 (1973).
Illinois:	Ill. Ann. Stat., Chpt 106¾, Section 1-7.
Indiana:	*Beck v. Beck*, 304 N.E.2d 541 (1973).
Kansas:	*In re Adoption of Marslof*, 434 P.2d 1010, 200 Kan. 128 (1967).
Kentucky:	*Simmons v. Simmons*, 470 S.W. 2d 585 (1972).
Maryland:	*Downes v. Kidwell*, 286 A.2d 199, 14 Md. App. 92 (1972).
Massachusetts:	*Commonwealth v. Leary*, 185 N.E. 2d 641 (1962).

Michigan:	*Serafin v. Serafin*, 241 N.W. 2d 272, 67 Mich. App. 517 (1976).
Minnesota:	*Curry v. Felix*, 149 N.W. 2d 92 (1967).
Mississippi:	*Stone v. Stone*, 210 So. 2d 672 (1968).
Missouri:	*Rasco v. Rasco*, 447 S.W. 2d 10 (1969).
Nebraska:	*Ford v. Ford*, 216 N.W.2d 176, 191 Neb. 548 (1974).
New Hampshire:	*Watts v. Watts*, 337 A.2d 350, 115 N.H. 186 (1975).
New Jersey:	*B. v. O.*, 232 A.2d 401; 50 N.J. 93 (1967).
New York:	*Annonymous v. Annonymous*, 1 A.D.2d 312, 150 N.Y.S.2d 344.
Oklahoma:	10 Okla.Stat.Ann., Sections 501-508.
Ohio:	*Rose v. Rose*, 242 N.E.2d 677, 16 Ohio,App.2d 123 (1968).
Pennsylvania:	28 Pa Stat., Section 307.1-307. 10.
Utah:	Utah Codes Ann. (1953) 78-45a-7 through 78-45a-17.
Washington:	*Stone v. Stone*, 458 P.2d 183 (1969).

Those states which by judicial decision and/or statute have invoked an irrebuttable presumption where there is cohabition of the husband and wife at the time of conception and the husband is not impotent or sterile are as follows:

Arkansas:	*Spratlin v. Evans*, 538 S.W.2d 527 (1976).
California:	Evidence Code, Section 621; *Kusior v. Silver*, 54 Cal.2d 603, 7 Cal.Ptr. 129 (1960).
Colorado:	*People in Interest of R M*, 548 P. 2d 1282 (1975).
Connecticut:	*Hartford National Bank and Trust Co. v. Prince*, 28 Conn. Sup. 348, 261 A.2d 287 (1968).
Louisiana:	*Williams v. Williams*, 87 So.2d 707 (1956).
North Carolina:	*Eubanks v. Eubanks*, 159 S.E. 2d 562, 273 N.C. 189 (1968).
Oregon:	Ore. Rev. Stat., Section 109. 070 (1).
Tennessee:	*Frazier v. McFerren*, 402 S.W. 2d 467, 55 Tenn.App. 431 (1964).
Texas:	*Zimmerman v. Zimmerman*, 448 S.W. 2d 184 (1972).

UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY (1953).

SECTION 1. *Authority for Test.* In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

SECTION 2. *Selection of Experts.* The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the Court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

SECTION 3. *Compensation of Expert Witnesses.* The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by [insert name of the proper public authority], and that, after payment by the parties or [insert name of the public authority] or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

SECTION 4. *Effect of Test Results.* If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved according. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

SECTION 5. *Effect on Presumption of Legitimacy.* The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

SECTION 6. *Applicability to Criminal Actions.* This act shall apply to criminal cases subject to the following limitations and provisions: (a) An order for the tests shall be made only upon application of a party or on the court's initiative; (b) the compensation of the experts shall be paid by [insert name of proper public authority] under order of court; (c) the court may direct a verdict of acquittal upon the conclusions of all the ex-

perts under the provisions of Section 4, otherwise the case shall be submitted for determination upon all the evidence.

SECTION 7. *Uniformity of Interpretation.* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 8. *Severability Clause.* If any part of this act is declared invalid the remaining portion shall continue in full force and effect and shall be construed as being the entire act.

SECTION 9. *Short Title.* This act may be cited as the Uniform Act on Blood Tests to Determine Paternity.

SECTION 10. *Repeal.* All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

[SECTION 11. *Time of Taking Effect.* This act shall take effect .....]

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ATTORNEYS FOR Appellant

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

HAROLD SMITH,)
Appellant,)
vs.)
ROSITA GUMMO, JAMES GUMMO, and ROBERT DANIEL GUMMO,)
Appellees.)

DECLARATION OF DONALD L. SMITH

I, DONALD L. SMITH, declare and say:

I am the attorney for appellant herein.

On February 17, 1978, I served an Application for Extension of Time to Docket Appeal on the Appellees and on the United States Supreme Court by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully paid in the United States mail at San Jose, California. Said Application for Extension of Time to Docket Appeal was addressed to the United States Supreme Court, Washington, D. C. 20453. A copy of said Application for Extension of Time to Docket Appeal is attached hereto as Exhibit "A" and incorporated herein by reference.

On February 22, February 23, and February 24, 1978, I contacted the Clerk of the Supreme Court of the United States by telephone requesting information regarding receipt of said

Application. In each instance, I was advised that said Application had not been received. On February 27, 1978, I again contacted the Office of the Clerk of the Supreme Court and spoke with Mr. Frank Lorson. Mr. Lorson advised me that said Application was received on February 27, 1978.

The Application for Extension of Time to Docket Appeal was sent to the Supreme Court of the United States thirteen (13) days prior to the mandated day for docketing. I am requesting that this honorable court, when considering this Application for Extension of Time to Docket Appeal give due consideration to my diligence in mailing said Application and not penalize appellant for the apparent inefficiencies of the United States Postal Service.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on February 27, 1978, at San Jose, California.

DONALD L. SMITH

DONALD L. SMITH, ESQ.
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996 Minnesota Avenue, Suite 205
San Jose, CA 95125
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Attorneys for Appellant

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

HAROLD SMITH,

Appellant,

vs.

ROSITA GUMMO, JAMES GUMMO, and ROBERT DANIEL GUMMO,

Appellees.

APPLICATION FOR EXTENSION OF TIME TO DOCKET APPEAL

TO: Mr. Justice Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit.

Pursuant to Rules 13(1) and 34(2) of the Rules of this Court, application is hereby made for an extension of time within which an appeal in this case may be docketed, for the reasons hereafter set forth.

1. The judgment sought to be reviewed is that of the Court of Appeal of the State of California, in the cause entitled HAROLD SMITH vs. ROSITA GUMMO, JAMES GUMMO, and ROBERT DANIEL GUMMO.

2. The aforesaid judgment, which held that California Evidence Code, Section 621 did not deny appellant due process of law, was entered on October 5, 1977. A Petition for Rehearing filed by the appellant herein on or about October 13, 1977, was denied by the Court of Appeal of the State of California, on November 4, 1977.

EXHIBIT "A"

A Petition for Hearing filed by the appellant herein on or about November 11, 1977, was denied by the Supreme Court of the State of California, on December 1, 1977.

3. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(2).

4. The time allowed by law for docketing this appeal will expire on March 1, 1978. Appellant requests an extension of the specified time limit for the following reasons: This case is one involving the propriety of a conclusive presumption statute for the determination of paternity. Counsel has been diligently performing legal research on the legal issues involved in relation to similar statutes in effect throughout the United States. Due to the voluminous amount of material uncovered by the research, and in order to properly organize this material for the purpose of this appeal, additional time is necessary.

WHEREFORE, it is respectfully requested that the time for docketing this appeal be extended from March 1, 1978, to and including April 30, 1978.

DATED: February 17, 1978.

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